UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO

PURPLE COMMUNICATIONS, INC. and Its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS		
and	**Cases**	**21-CA-149635**
		28-CA-179794
PACIFIC MEDIA WORKERS GUILD,		**21-CA-182016**
LOCAL 39521, THE NEWSPAPER GUILD,		**32-CA-185337**
COMMUNICATIONS WORKERS OF		**21-CA-185343**
AMERICA, AFL-CIO		**27-CA-185377**
		27-CA-186448
		28-CA-186509
		21-CA-187642
		28-CA-192041
		27-CA-192084
		28-CA-197009
		27-CA-197062

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE

Fernando Anzaldua
Kyler Scheid
Counsel for the General Counsel
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: 602-416-4757
Facsimile: 602-640-2178
Email: fernando.anzaldua@nlrb.gov
kyler.scheid@nlrb.gov

Table of Contents

I. INTRODUCTION 5

II. STATEMENT OF THE CASE 10

III. SPECIFICATION OF THE QUESTIONS INVOLVED AND TO BE ARGUED ... 10

A. Whether the ALJ erred in failing to find that Respondent's supervisor, Tera Thrasher (Thrasher), via Facebook chat, suggested employees contact the National Labor Relations Board for information about how to decertify the Union as their collective-bargaining representative in violation of the Act. 10

C. Whether the ALJ erred in failing to find Respondent did not provide the following information requested by the Union on July 6, 2016, in violation of the Act: verification that the Ares/Orion software technology and hardware technology provided to [employee] are free of technical abnormalities. 11

D. Whether the ALJ erred in failing to find Respondent did not provide the following information requested by the Union on July 22, 2018, in violation of the Act: documents and the dates they went into effect, reflecting any training given to the person or persons who investigate caller complaints and determine if such complaints warrant disciplinary action. 11

E. Whether the ALJ erred in failing to order the notice be read by Sahar Haraz during meetings scheduled to ensure the widest possible attendance at Respondent's facilities in the presence of a Board agent, or alternatively, to order that a Board agent read the notice to employees during work time at Respondent's facilities in the presence of Respondent's supervisors and agents. 11

IV. STATEMENT OF FACTS 11

A. Thrasher's Facebook Chats with Employee Hannah Mattix 11

B. The Union's July 6, 2017, Request for Information 13

C. The Union's July 22, 2017, Request for Information 16

D. The Notice Reading 16

V. ARGUMENT 17

A. The ALJ Erred in Failing to Find that Respondent's supervisor, Tera Thrasher (Thrasher), via Facebook chat, suggested employees contact the National Labor Relations Board for information about how to decertify the Union as their collective-bargaining representative and provided more than ministerial assistance to employees in helping them reject the Union as their collective-bargaining representative in violation of the Act 17

B. The ALJ Erred in Failing to Find Respondent did not provide the following information requested by the Union on July 6, 2016, in violation of the Act: verification that the Ares/Orion software technology and hardware technology provided to [employee] are free of technical abnormalities 20

C. The ALJ Erred in Failing to Find Respondent did not provide the following information requested by the Union on July 22, 2018, in violation of the Act: documents and the dates they went into effect, reflecting any training given to the person or persons who investigate caller complaints and determine if such complaints warrant disciplinary action 23

D. The ALJ Erred in Failing to Order a Notice Reading by Sahar Haraz during meetings scheduled to ensure the widest possible attendance at Respondent's facilities in the presence of a Board agent, or alternatively, to order that a Board agent read the notice to employees during work time at Respondent's facilities in the presence of Respondent's supervisors and agents 25

VI. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

BHP (USA) Inc. dba BHP Coal New Mex.,
341 NLRB 1316 (2004) 24
Bridgestone/Firestone, Inc.,
355 NLRB 941 (2001) 19
Chelsea Homes,
298 NLRB 813 (1990) 18
Corrections Corporation of America,
347 NLRB 632 (2006) 18
Dayton Blueprint Co.,
193 NLRB 1100 (1971) 18
Fieldcrest Cannon, Inc.,
318 NLRB 470 (1995) 26
J.P. Stevens & Co. v. NLRB,
417 F.2d 533 (5th Cir. 1969) 26
Lee Lumber and Bldg. Material,
306 NLRB 408 (1992) 20
Marriott In Flite Services,
285 NLRB 755, 768-769 (1981) 19
Mohawk Industries,
334 NLRB 1170 (2001) 20
Monmouth Care Center,
354 NLRB 11 (2009) 22
Olean Gen. Hosp.,
363 NLRB No. 62 (2015) 24
Pacific Beach Hotel,
361 NLRB 709 (2014) 17
PAE Aviation,
366 NLRB No. 95, slip op. at 3 22
Pennco, Inc.,
212 NLRB 677 (1974) 22
Purple Communications, Inc.,
361 NLRB No. 43 (2014) 27
Register Guard,
351 NLRB 1110 (2007) 27
Salem Hospital Corp.,
361 NLRB No. 61 (2014) reaff'g 358 NLRB No. 95 (2012). 25
Silver Spur Casino,
270 NLRB 1067 (1984) 19
Times-Herald, Inc .,
253 NLRB 524 (1980) .....
Toledo Blade Co., Inc.,
343 NLRB 385 (2004) 24
Vestal Nursing Center,
328 NLRB 87 (1999) 20
Washington Street Brass & Iron Foundry, Inc.
268 NLRB 338 (1983) 19

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC. and Its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS		
and	**Cases**	**21-CA-149635**
		28-CA-179794
PACIFIC MEDIA WORKERS GUILD,		**21-CA-182016**
LOCAL 39521, THE NEWSPAPER GUILD,		**32-CA-185337**
COMMUNICATIONS WORKERS OF		**21-CA-185343**
AMERICA, AFL-CIO		**27-CA-185377**
		27-CA-186448
		28-CA-186509
		21-CA-187642
		28-CA-192041
		27-CA-192084
		28-CA-197009
		27-CA-197062

COUNSEL FOR THE GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

In a decision issued on August 3, 2018, Administrative Law Judge Mara-Louise Azalone (the ALJ), found that Respondent,[1] by its supervisors and agents, dating back to April of 2015, violated Section 8(a)(1) of the Act by:

(a) Maintaining an overly broad electronic communications policy that unlawfully interferes with employees' use of Respondent's email system for Section 7 purposes;

(b) Maintaining an overly broad confidentiality policy that prevents employees from discussing performance appraisals, salary increases and other employment records;

(c) Disparately applying its Internet, Intranet, Voicemail and Electronic Communication Policy to prohibit non-business emails relating to

[1] Respondent CSDVRS, Respondent Purple and the CGC entered into a stipulation regarding the allegation Respondent Purple and Respondent CSDVRS are joint employers. JTX30. Respondent CSDVRS and Respondent Purple are referred to throughout this brief as Respondent.

unionization, while permitting non-business emails that do not relate to unionization;

(d) Disparately applying its non-solicitation policy to ban employees from placing union materials in the break room of its Tempe call center;

(e) Maintaining overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives:

(1) objecting to a question asked by management before the interviewed employee answers it; and

(2) offering exculpatory evidence before management questioning is complete;

(f) Informing employees that it would be futile for them to select the Union as their bargaining representative, by telling them that the 2015 Agreement offers substantially the same terms and benefits as its non-represented employees receive without having to pay dues;

(g) Promising employees benefits for the purpose of coercing them into rejecting the Union as their bargaining representative by telling them that they would be granted all terms and benefits contained in the 2015 Agreement;

(h) Promulgating an overly-broad and discriminatory directive prohibiting employee10 stewards from using Respondent's email system for communicating with employees in its call centers regarding the Union;

(i) Labeling employee disciplinary notices as "confidential";

(j) Threatening to investigate employees based on the Union's request for information regarding employee discipline;

(k) Threatening employees with unspecified reprisals for engaging in union or other protected activities;

(l) Interrogating employees about their union and other protected activities, and the union and other protected activities of others;

(m) Denying unit employees the presence and/or assistance of their union representative at an interview which the employee reasonably believes may result in disciplinary action, including by ordering the union representative in question to remain silent and/or refrain from interrupting;

(n) Creating the impression that employees' union and other protected conduct is under surveillance;

(o) Soliciting employees to report on the union activities of their coworkers; and

(p) Disparaging the Union in its role as the unit employees' collective-bargaining representative by suggesting that, by bargaining a collective-bargaining agreement for them, the Union had "done nothing."

The ALJ found Respondent violated Sections 8(a)(1) and (3) of the Act by:

(a) Directing employees to remove union-provided food, and pro-union displays and decorations from the work place;

(b) Removing union flyers from the tables in the break room of its Tempe call center; and

(c) Removing union-provided food from the break room of its San Diego call center;

The ALJ also Respondent violated Sections 8(a)(5) and (1) of the Act by:

(a) In March 2016, unilaterally changing the terms and conditions of employment of unit employees by ceasing to pay unit employees who were hired before August 2010 a differential for community interpreting work after they converted from full-time to "flex" status, without giving the Union notice and the opportunity to bargain over this change;

(b) In about May 2016, failing to continue in effect all the terms and conditions of the 2015 Agreement by ceasing to deduct dues from the earnings of unit employees attributable to the performance of community interpreting work without the Union's consent.

(c) Failing to provide the following necessary and relevant information requested by the Union for the performance of collective bargaining duties:

(1) information identified in complaint ¶ 7(n) regarding dual rates earned by unit employees;

(2) information identified in complaint ¶ 7(t) regarding the temporary closure of the San Diego call center during the summer of 2016;

(3) information regarding discipline issued to Margie Brooks, as identified in complaint ¶ 7(p)(5) through (8);

(4) information regarding discipline issued to Ava Sterling, as identified in complain¶ 7(q); and

(5) information regarding discipline issued to Nora Maschue, as identified in complaint ¶ 7(w).

(d) Unreasonably delaying in providing information regarding discipline issued to Margie Brooks, as identified in complaint ¶ 7(p)(1) through (3), which information was necessary and relevant information requested by the Union for the performance of collective bargaining duties.

The ALJ found Respondent violated Sections 8(a)(5), (3) and (1) by:

(a) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following employee conduct without giving the Union notice and the opportunity to bargain over the same:

(1) using break rooms for pro-union activities and/or placing union literature in break rooms (other than on designated union bulletin boards);

(2) conducting union business on "work place property";

(3) engaging in union conduct, including placing union-provided food, displays or other items in break rooms without prior authorization by management;

(4) displaying balloons and other pro-union paraphernalia in work areas;

(5) bringing in "treats or other efforts" for coworkers;

(6) soliciting in work areas, other than the display of personal effects;

(7) displaying small symbols of union loyalty, except in designated areas; and

(8) displaying larger symbols and displays of Union loyalty in any areas;

(b) Promulgating and maintaining an overly broad and discriminatory rule requiring employee-stewards to remove union announcements from tables

in the break room at its Tempe call center, without giving the Union notice and the opportunity to bargain over the same; and

(c) Promulgating and maintaining the following overly broad and discriminatory rules prohibiting the following conduct by employee-stewards serving as *Weingarten* representatives, without giving the Union notice and the opportunity to bargain over the same:

(1) interrupting during the meeting;

(2) providing information to justify the interviewed employee's conduct prior to the end of questioning by management representative(s);

(3) engaging in combative behavior, standing, using intimidating body language or making sarcastic or snide comments; and

(4) meeting with interviewed employee on the VRS floor.

See JD(SF)-20-18. Counsel for the General Counsel (CGC) respectfully excepts to the ALJ's failure to find supervisor Tera Thrasher (Thrasher), via Facebook chat, suggested that employees contact the National Labor Relations Board for information about how to decertify the Union as their collective-bargaining representative and provided more than ministerial assistance to employees in helping them reject the Union as their bargaining representative. CGC also respectfully excepts to the ALJ's failure to find Respondent failed to provide the following information requested by the Union: about July 6, 2016, verification that the Ares/Orion software technology and hardware technology provided to Ms. Brooks to process calls are free of technical abnormalities; and about July 22, 2016, documents and the dates they went into effect, reflecting any training given to the person or persons who investigate caller complaints and determine if such complaints warrant disciplinary action. Finally, CGC respectfully excepts to the ALJ's failure to Order a notice reading in this case.

II. STATEMENT OF THE CASE[2]

The Regional Director for Region 28 issued the latest complaint in this matter on June 19, 2017.[3] Respondent filed its latest Answer was filed on June 30, 2017.[4] The ALJ conducted a hearing concerning the allegations of the complaint over 16 days on July 13, 2017; August 7 to 11, 2017; September 5 to 7, 2017; and September 25 to October 3, 2017. On August 3, 2018, the ALJ issued a Decision and Recommended Order finding Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(1), (3) and (5) of the Act as set forth in more detail in the Introduction section of this brief. On October 31, 2018, Respondent filed exceptions to the ALJ's Decision and Recommended Order, which were served on CGC on the same date. CGC is separately filing an answering brief to Respondent's exceptions and cross-exceptions to the ALJ's decision. CGC hereby respectfully submits this brief in support of the General Counsel's cross-exceptions.

III. SPECIFICATION OF THE QUESTIONS INVOLVED AND TO BE ARGUED

A. Whether the ALJ erred in failing to find that Respondent's supervisor, Tera Thrasher (Thrasher), via Facebook chat, suggested employees contact the National Labor Relations Board for information about how to decertify the Union as their collective-bargaining representative in violation of the Act.

B. **Whether the ALJ erred in failing to find Respondent's supervisor, Thrasher, during the same conversation, provided more than ministerial assistance to employees in helping them reject the Union as their collective-bargaining representative in violation of the Act.**

[2] GCX___ refers to General Counsel's Exhibit followed by the exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number; JTX___ refers to Joint Exhibit followed by the exhibit number; "Tr. _:___" refers to transcript page followed by line or lines of the unfair labor practice hearing; JD___ refers to the page number of the Decision of the Administrative Law Judge dated August 3, 2018.

[3] GCX1(mmm); JD2

[4] GCX1(qqq); JD2

C. Whether the ALJ erred in failing to find Respondent did not provide the following information requested by the Union on July 6, 2016, in violation of the Act: verification that the Ares/Orion software technology and hardware technology provided to [employee] are free of technical abnormalities.

D. Whether the ALJ erred in failing to find Respondent did not provide the following information requested by the Union on July 22, 2018, in violation of the Act: documents and the dates they went into effect, reflecting any training given to the person or persons who investigate caller complaints and determine if such complaints warrant disciplinary action.

E. Whether the ALJ erred in failing to order the notice be read by Sahar Haraz during meetings scheduled to ensure the widest possible attendance at Respondent's facilities in the presence of a Board agent, or alternatively, to order that a Board agent read the notice to employees during work time at Respondent's facilities in the presence of Respondent's supervisors and agents.

IV. STATEMENT OF FACTS

A. Thrasher's Facebook Chats with Employee Hannah Mattix[5]

Thrasher was a center supervisor at Respondent's San Diego call center from early July 2016 through the end of the year. Previously, she had worked as a video interpreter (VI) at the center.[6] On November 1, 2016, VI Delia D'Angelo (D'Angelo) observed what she recognized to be Thrasher's Facebook page open on a shared work computer. D'Angelo took numerous pictures of the computer screen, which showed messages between Thrasher and VI Hannah Mattix (Mattix).[7] The ALJ found the messages were sent and received by Mattix and Thrasher beginning in August 2016. [8] The pictures of the Facebook messages show Thrasher and Mattix had the following conversations:

Conversation 1:

[5] The two exceptions relating to Thrasher's Facebook chats are considered together for the purposes of the facts section of this brief, since they stemmed from the same Facebook chat log between August and November 2016.

[6] Tr. 1727-1728; JD48.

[7] Tr. 2057-2058; JD 48; GCX 74.

[8] JD48.

Thrasher: awesome!!!

Mattix: The union sent around some statement about the firings. It was so poorly written and filled with such political rhetoric *eye roll

Thrasher: Was it on orange paper?

What did the paper say?

Mattix: No, it was the usual white paper with the logo, it covered something about a mediation that had happened back in april I'll send you a picture, is that legal?

Thrasher: what do you mean legal?

Mattix: I mean I can send you, as my manager, a copy, right?

Thrasher: Ya you can send me whatever you want

Mattix: Sweet!

Thrasher: I will show it to the peeps above me but I will not tell them where I got it

Conversation 2:

Mattix: Right????? It was spectacularly whining and self gratifying Instead of saying "After rewarding bad behavior for too long, the employees finally got their just recompense."

Thrasher: I agree! AND wayne and robert were talking about how much they hated the union and they blamed the union for the contract in the (unreadable)

Thrasher: and they are trying to use scare tactects [sic] to get people on their side It makes me sad ☹ And why are they passing out info while at work anyways???

Mattix: The discipline type, self monitoring, the ridiculous wording "which is just about all the discipline meted out…

I thought that wasn't allowed?? Unless Karen[9] was off the clock.

Thrasher: It is not allowed to conduct union business on work place property

Mattix: And she used the printer too

Thrasher: ugh… Wish I could have caught her

[9] Karen Boyle is another VI in the San Diego facility. Boyle also acted as a Union steward.

Mattix: She did it riiight in front of everyone working. Ridiculous

Conversation 3:

Mattix: How's the atmosphere there?

Thrasher: Not as much union here lol National labor relations board is a good way to check out how to deunionize

Mattix: I definitely have scanned that and need to look into it a bit more for additional info. I'm just wondering about the minutes versus login. I know one of the corona people said they were getting a warning for their billable but she has a 90% login most days. Would Henrik be able to answer Purple's general login guidelines?[10]

B. The Union's July 6, 2017, Request for Information

On July 6, 2016, Martin Yost (Yost), who is a flex VI at Respondent's San Diego facility and the Union's sole staff representative responsible for representing unit employees,[11] sent Respondent's Operations Manager, Jennifer Stambaugh (Stambaugh), an email requesting that Respondent furnish the Union with the following information:[12]

(1) [. . .]

(2) [. . .]

(3) [. . .]

(4) verification that the Ares/Orion software technology and hardware technology provided to Ms. Brooks to process calls are free of technical abnormalities;

(5) copies of all complaints lodged by the customer who complained against Ms. Brooks in order to ascertain potential patterns of the complainant (chronic complainer, nature of complaints, etcetera);

(6) [. . .]

(7) copies of past discipline issued at [Respondent Purple's San Diego facility] for customer complaints; and

[10] GCX74; JD 48-52.

[11] Tr. 2578, 2590-2591; JD 5.

[12] JTX83; Tr. 2681:11-15 (Yost).

(8) copies of past discipline issued (minus identifiable information) including dates, at other centers for customer complaints.

On July 8, 2016, Sahar Haraz (Haraz), Respondent's Human Resources Business Partner,[13] sent Yost an email requesting an extension of time to respond to the information request and stating that the she would have the information to Yost no later than July 22, 2016.[14]

On July 22, 2016, Haraz sent an email to the incorrect email address for Yost and attached a response to the information request.[15] However, in its response, Respondent did not provide responsive documents for paragraphs 4, 5, 7, and 8 above. Specifically, regarding paragraph 4, Haraz stated that she did not understand the request where it referenced "free from abnormalities," and she proceeded to ask the Union to define abnormalities, produce a list of where the Union got information that there may be "abnormalities" in Respondent's systems, any and all correspondence between the Union and its members, and documentation of dates, times and customer in which the "abnormalities" occurred.[16]

Haraz's response was not sent to the Union because she sent the response to the wrong email address for Yost.[17] Haraz eventually sent the response to Yost on November 2, 2016, telling Yost that her lawyer had pointed out to her that she sent it to the wrong email address.[18] Yet, between July and November 2016, Yost and Haraz had exchanged much correspondence. According to Yost, they emailed regularly, weekly, approximately several times each week.[19] Haraz testified that she was aware there was a problem—she had typed in Yost's email address

[13] Haraz is responsible for handling human resources within the organization for its approximately (at the time of the hearing) 19 call centers. Tr. 130:15 to 104:8.

[14] JTX88.

[15] JTX89; JTX87.

[16] JTX87 at 1294.

[17] JTX89.

[18] JTX89.

[19] Tr. 2682:17-25.

into her Outlook mailbox incorrectly and saved it in Outlook.[20] As a result, Haraz testified she has to look over her emails multiple times to make sure she is sending it to the correct email address.[21] Haraz also testified about experiencing issues sending emails to Yost, and receiving auto replies in response to her attempts.[22] Although Haraz was aware her computer had this problem,[23] she testified she couldn't recall getting a bounce back message like the email address was from his the bad address on this occasion.[24]

Yost testified that the moment he received Haraz's November 2, 2016, email response he thought her explanation was strange. He tested the email address by sending something to it. Within seconds it bounced back with "that mailer demon undeliverable response that one gests when you send something to a bogus email address."[25] After receiving the response on November 2, 2016, Yost did not respond to Haraz.[26] Haraz never provided the requested information.

By the time the Union had received Haraz's November 2, 2016, email response the Union had already filed a charge related to the refusal to provide the information, which had been under investigation for nearly three months.[27]

[20] Tr. 1645:5-9.

[21] Tr. 1645: 10-13.

[22] Tr. 1645: 14-20.

[23] Tr. 1645: 13-16.

[24] Tr. 1645:17-20.

[25] Tr. 2683:12-22.

[26] Tr. 2684:14-16. Between the July 6, 2016 request for information and Haraz's response to the correct email address (after being notified by her attorney), the Union had filed several of the charges at issue in this proceeding. Many of those charges involve allegations contained in the complaint relating to Respondent's failure to provide requested information and/or unreasonably delaying in providing the requested information.

[27] GCX 1(g).

C. The Union's July 22, 2017, Request for Information

On July 22, 2016, Yost emailed Haraz requesting that the Respondent furnish the Union with certain information regarding customer complaints.[28] Specifically, the Union requested documents and the dates they went into effect, reflecting any training given to the person or persons who investigate [customer complaints] and determine if such complaints warrant disciplinary action.[29] Respondent did not respond to Yost's request for information.[30]

D. The Notice Reading

The ALJ declined to recommend a notice reading remedy in this case.[31] The ALJ noted that Respondent was technically a recidivist with respect to its unlawful email policy by continuing to maintain and apply its unlawful handbook rule following the Board's ruling it was unlawful.[32] However, the ALJ was "sufficiently concerned that Respondent's unit employees have been subjected to a pervasive assault on their rights under the Act, including unlawful conduct tending to undermine the Union as the unit employees' selected bargaining representative, sufficient to warrant such a remedy.[33]

[28] GCX59(b).

[29] GCX59 at ¶5; JD77.

[30] Tr. 2686:2-6; JD77.

[31] JD94.

[32] The Board found the rule unlawful in 2014, and again on exceptions on March 24, 2017. Respondent maintained the rule for several years notwithstanding the Board's findings in both matters. JD6-7.

[33] JD93 at fn. 85 citing *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014) (ordering posting of explanation of rights setting out employees' core rights under the Act, coupled with "clear general examples that are specifically relevant to the unfair labor practices found").

V. ARGUMENT

A. The ALJ Erred in Failing to Find that Respondent's supervisor, Tera Thrasher (Thrasher), via Facebook chat, suggested employees contact the National Labor Relations Board for information about how to decertify the Union as their collective-bargaining representative and provided more than ministerial assistance to employees in helping them reject the Union as their collective-bargaining representative in violation of the Act[34]

The test for determining whether an Employer has unlawfully assisted as opposed to merely provided ministerial assistance to a decertification petition was posited in *Dayton Blueprint Co.*,[35] as follows: whether the petition would have been filed even without any of the employer's actions. The most often stated rule in this area is that an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership."[36] In *Times-Herald, Inc.*,[37] the Board similarly stated: "Indeed, the test is whether the Respondent's conduct constitutes more than ministerial aid."[38] In *Corrections Corporation of America*,[39] the Board stated: "it is not determinative that an employer does not expressly advise employees to get rid of the union. Indeed, such direct appeals are not essential to establish that an employer solicited decertification."

The Board has found that where an employer has provided specific petition language and instructed employees to return the signed petition to management, the employer has exceeded

[34] The two exceptions relating to Thrasher's Facebook chats are considered together for the purposes of the argument section of this brief, since they stemmed from the same Facebook chat log between August and November 2016.

[35] 193 NLRB 1100 (1971)

[36] *Chelsea Homes*, 298 NLRB 813, 834 (1990).

[37] 253 NLRB 524 (1980)

[38] *Id.*

[39] 347 NLRB 632, 633 (2006) (internal citations omitted)

lawful assistance.[40] On the other hand, in *Washington Street Brass & Iron Foundry, Inc.*,[41] an ALJ found (and the Board affirmed without comment) that when a bargaining unit employee sought the advice of employer's labor consultant, and the consultant reviewed the employee's draft of the petition language and recommended one change in wording and using the full name of the union, there was no showing the employer instigated or induced the petition. The employees in *Washington Street Brass & Iron Foundry, Inc.*, circulated the petition without further manifestation of the employer's approval and without further involvement by the employer during the solicitation process.[42] Similarly, in *Bridgestone/Firestone, Inc.*,[43] an employee initiated contact with the employer and asked if there was any way that he could get out of being in the union. He did so in a context free of coercion, and added that he was "never in a union before" and "figured he'd just keep it like that." The employer suggested and prepared a decert petition for the employee, and the Board found there was no evidence the employer induced or influenced the employee's opposition to the Union or his desire to get out of the Union, nor was there any evidence the employee was induced to post the petition or collect signatures.

The ALJ found, as alleged, Respondent, through its supervisor Thrasher, via the Facebook chats in evidence: (1) interrogated its employees about their Union membership, activities, and sympathies and the Union membership, activities, and sympathies of other employees; (2)engaged in surveillance of its employees engaged in Union activities; (3) by

[40] *Marriott In Flite Services*, 285 NLRB 755, 768-769 (1981); *Silver Spur Casino*, 270 NLRB 1067, 1070 (1984) (finding that the employer unlawfully assisted decertification where it had implanted the idea in employees minds, suggested employees set up a petition, called them at home to discuss it, and eventually provided them with the language of a petition).

[41] 268 NLRB 338, 339 (1983),

[42] *Id.*

[43] 355 NLRB 941 (2001)

saying it would show Union literature provided by its employees to higher-level supervisors but not tell them where it was obtained, created an impression among its employees that their Union activities were under surveillance by Respondent; (4) promulgated and since then has maintained an overly-broad and discriminatory rule or directive prohibiting its employees from conducting Union business on work place property; and (5) threatened its employees with unspecified reprisals because they used Respondent's printer for Union activities, when other non-business use of Respondent's printer is permitted.

Notwithstanding the above, the ALJ found that Thrasher's referring Mattix to the Board for information about decertifying the Union did not amount to unlawful assistance because an employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere "wherein employees would tend to feel peril in refraining from [withdrawing]."[44] In so finding, the ALJ appears to have treated the Facebook chats between Thrasher and Mattix as three separate and distinct conversations, instead of the months-long, continuous stream of conversation between the two. When viewed in that light, the chats in evidence demonstrate Thrasher, over an extended period of time: interrogated Mattix about her coworkers' union activities, encouraged Mattix to send her "whatever you want" pertaining to the Union, issued threats against Union supporting employees and encouraged Mattix to spy on her coworkers Union activities.

During this chat conversation, and in response to Mattix asking Thrasher what the atmosphere was like in one of Respondent's non-Unionized facilities, Thrasher wrote: "Not as much union here lol National labor relations board is a good way to check out how to

[44] JD52 citing *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001)(quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999)); see also *Lee Lumber and Bldg. Material*, 306 NLRB 408, 410 (1992) (manager "did not unlawfully provide assistance by advising the employees, in general terms, about how to file the [decertification] petition").

deunionize." The first part of Thrasher's response, "not as much union here lol" suggested to Mattix that her question about the atmosphere in a non-Unionized facility was laughable (i.e. why would you even have to ask about the atmosphere in a *non-Unionized* facility?).[45] The obvious implication of the first part of Thrasher's response was the atmosphere was better in facilities that were not Union. Not content to merely suggest the grass was greener in Respondent's non-Unionized facility, Thrasher took it a step further. Following her first comment, she directed Mattix to the National Labor Relations Board to "check out how to deunionize." Thus Thrasher's comment both implied that things were better at facilities without the Union and implanted the idea in Mattix's mind as to where she should go to decertify the collective-bargaining representative. Notably, there is no evidence that Mattix ever asked Thrasher about how to decertify the Union. Respondent was not merely providing information about decertification to an employee who independently sought it out. Rather, the discussion of the subject was initiated by Thrasher in the course of all her other unlawful conduct.

When considered in context, Thrasher's comments referring Mattix to the Board to learn more about deunionization were unlawful and provided more than ministerial assistance to employees in helping them reject the Union as their collective-bargaining representative in violation of the Act.

B. The ALJ Erred in Failing to Find Respondent did not provide the following information requested by the Union on July 6, 2016, in violation of the Act: verification that the Ares/Orion software technology and hardware technology provided to [employee] are free of technical abnormalities

The ALJ dismissed this allegation because, under the circumstances, it was not evident on its face what form of verification the Union sought, and, despite Haraz's request for

[45] The dictionary definition of LOL is "laugh out loud; laughing out loud." See Merriam Webster Dictionary, available at https://www.merriam-webster.com/dictionary/LOL, (last visitied December 14, 2018).

clarification, the Union failed to explain what it meant by the term, "technical abnormalities."[46] However, the evidence establishes that Haraz's delay in responding to the request for information deprived the Union of an opportunity to clarify. Moreover, instead of volleying back with her own more extensive request for information,[47] Haraz could simply have responded substantively based on a reasonable, good faith reading of the Union's request, by stating whether Respondent was aware of any technical abnormalities in the employee's software.

As the ALJ pointed out correctly, absent evidence of justification, an unreasonable delay in providing requested information constitutes a violation of Section 8(a)(5) "'inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [r]espondent's duty to furnish it as promptly as possible.'"[48] As the Board recently reiterated, when evaluating whether a delay was reasonable:

> [t]he analysis is an objective one; it focuses not on whether the employer delayed in bad faith or in an attempt to avoid production, but on whether it supplied the requested information in a reasonable time.

Here, there can be no doubt there was an unreasonable delay in Haraz providing many of the items in response to the Union's information request.

This information request dealt with the Union's request for information relating to a discipline that was issued to VI Margie Brooks. A number of the items of the information request, as discussed *supra*, were provided only after Haraz was informed by Respondent's counsel that she had not sent them to Yost. By that point in time, the Regional Director for

---

[46] JD85.

[47] Haraz's request in response to the Union's request included, among other things, an explicit request for communications between employees and their bargaining representative.

[48] *PAE Aviation*, 366 NLRB No. 95, slip op. at 3 (citing *Pennco, Inc.*, 212 NLRB 677, 678 (1974)); *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012) ("[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all").

Region 28 had issued the first complaint and notice of hearing in this case,[49] and numerous charges had been filed, which, following investigation, were ultimately consolidated into the complaint.[50] A finding that Respondent did not fail to provide the requested information based on a request for clarification of the request made months after the Union had already filed an unfair labor practice charge alleging refusal to provide information would serve to discourage timely, good-faith responses to requests for information. Further, Haraz could have given a good faith substantive response to the Unions request by verifying—yes or no—whether Respondent was aware of any abnormalities with Brooks' software. Instead, Haraz not only claimed not to understand the Union's request, but also went on the offensive, asking the Union to produce a list of where the Union got information that there may be "abnormalities" in Respondent's systems, any and all correspondence between the Union and its members, and documentation of dates, times and customer in which the "abnormalities" occurred. Thus, she suggested that, to simply get verification of whether there were abnormalities, the Union needed to empty its files, including by disclosing all of its communications with the employees it represents about abnormalities. In sum, not only was Haraz's request for clarification beyond untimely; it also simply was not a good faith response.

[49] The first complaint and notice of hearing in this case issued on October 31, 2016. GCX 1(u).

[50] GCX 1(ss), 1(zz), 1(mmm).

C. The ALJ Erred in Failing to Find Respondent did not provide the following information requested by the Union on July 22, 2018, in violation of the Act: documents and the dates they went into effect, reflecting any training given to the person or persons who investigate caller complaints and determine if such complaints warrant disciplinary action

Training programs are a mandatory subject of bargaining and presumptively relevant.[51] Although this request pertains to training of individuals outside the unit, the training of individuals responsible for investigating customer complaints are of the utmost importance to the bargaining unit employees as these investigators determinations have substantial impact on bargaining unit employees' jobs as they can, and in this case actually have, resulted in discipline. In that respect, the training given to investigators and/or the process of investigating caller complaints is related to "terms and conditions of employment" of unit employees and has a direct effect on their continued employment, much like any other disciplinary system.[52]

Moreover, the Union's request(s) were made in reference not only to the demand to bargain but also to the "recent and multiple Disciplinary Action Reports issued to unit employees tied to customer complaints," and the Union's concerns about the legitimacy and validity of such complaints. Grievances regarding discipline received by unit members stemming from caller complaints, and the information would be relevant to the Union's defense of those disciplinary actions at arbitration. As the Board has noted, the Union's showing required to gain access to information which is necessary for it to analyze whether a violation has occurred "is not an

[51] See generally *Olean Gen. Hosp.*, 363 NLRB No. 62 (2015) (decision to use unit nurses to provide clinical training for student nurses for a few months is almost exclusively an aspect of the relationship between employer and employee, and hence a mandatory subject of bargaining) (internal citations and quotations omitted).

[52] See *Toledo Blade Co., Inc.*, 343 NLRB 385 (2004) (unilateral change of disciplinary policy and work rules are mandatory subject of bargaining); *BHP (USA) Inc. dba BHP Coal New Mex.*, 341 NLRB 1316 (2004) (unilateral change in levels of discipline for specific combinations of unexcused absences and tardiness and discharge based on these unlawfully imposed changes are mandatory subjects of bargaining)

exceptionally heavy one,' it does require a showing of 'probability that the desired information is relevant and … would be of use to the union in carrying out its statutory duties and responsibilities.'"[53] Even information that is not considered presumptively relevant will be deemed relevant if it is specifically necessary to monitor contract compliance, determine if a grievance could be filed or is potentially relevant to the Union's representation of employees.[54]

The ALJ found that, because, in the collective-bargaining agreement, the Union agreed that Respondent had the right to establish customer service and conduct standards, maintain discipline, and discipline, suspend, and discharge employees, it waived the right to obtain the requested information about training given to those who investigate customer complaints and determine whether they warrant discipline. However, even assuming the Union clearly and unmistakably waived the right to bargain over the standards for issuing discipline for customer complaints, the Union still had a valid basis for requesting the information. The Union was responsible for enforcing collective-bargaining agreements that, among other things, prohibited discrimination based on various protected statuses and required just cause for discipline. Thus, regardless of whether the Union waived its right to bargain over the standards for issuing discipline for customer complaints, it could use the information to ensure that those standards were being applied in a non-discriminatory manner and that discipline was not being issued without just cause.

[53] *Saginaw Control & Engineering*, 339 NRLB 541, 545 (2003).

[54] *Salem Hospital Corp.*, 361 NLRB No. 61 (2014), reaff'g 358 NLRB No. 95 (2012).

D. The ALJ Erred in Failing to Order a Notice Reading by Sahar Haraz during meetings scheduled to ensure the widest possible attendance at Respondent's facilities in the presence of a Board agent, or alternatively, to order that a Board agent read the notice to employees during work time at Respondent's facilities in the presence of Respondent's supervisors and agents

The Board may order extraordinary remedies when the Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found."[55] For example, a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance."[56]

Respondent's unfair labor practices are numerous, pervasive and outrageous, and there is considerable evidence of Respondent's animosity toward employees' exercise of Section 7 rights. As set forth *supra* pages 2-6, following the hearing, the ALJ found dozens of violations of Sections 8(a)(1), (3) and (5) of the Act. Not only were the allegations numerous, they also were pervasive and outrageous. Perhaps most outrageous of all the allegations were those surrounding Respondent's crackdown on its employees' celebrations to show support for the Union on May 3, 2016. Prior to May 3, 2016, it had been a regular practice for employees to bring food to the Unionized facilities to share with their coworkers. As one San Diego VI testified, "if the kitchen table was empty, we were really surprised."[57] Notwithstanding the longstanding and regular practice of employees bringing food to share with their coworkers at the Unionized facilities, on May 3, 2016, Respondent's highest level managers at those facilities and Haraz, the Employer's Human Resources Business Partner responsible for all of

[55] *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases)

[56] *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969).

[57] JD26; Tr. 414, 599–601, 603, 612, 615, 700–703, 840–844, 1090–1091, 1102, 1147–1148, 1156, 1259–1262, 1280, 1910, 1975–1976, 2008, 2302–2303, 2369, 2469; GC Exh. 96

Respondent's facilities, swiftly cracked down on the show of support. As the ALJ noted, Respondent's managers acted swiftly and unlawfully:

> monitoring and recording the event; they also alerted Haraz, who interrogated employees individual employees to determine who was responsible, issued a new, preapproval requirement for bringing food into break rooms and ordered the food and decorations removed. According to Haraz, unlike Respondent's official celebration, the pro-union events were a "distraction" for employees.[58]

Notably, the ALJ found Respondent's defense with respect to these allegations amounted to "no more than an after-the-fact rationale to explain away its conduct.[59] With respect to Haraz's explanation for her actions, the ALJ noted Haraz's explanation appeared to reflect unsuccessful coaching: she testified that she ordered the pro-union food and displays removed, "[b]ecause, first of all, if you were to go back to look at article 24 of the collective bargaining agreement, that's definitely in violation, but more than anything, that aside, you can't have large—you can't have a party in the center area when people are working."[60]

Second, as the ALJ noted, Respondent is a recidivist with a history of animosity toward the Union and its employees' rights.[61] Moreover, the charges in the instant matter did not occur over an isolated period of time, but were filed over the course of two (2) years from April 6, 2015, through June 16, 2017. The evidence presented demonstrates Respondent has harassed, interrogated, spied on and threatened its employees and employee-stewards in response to their

---

[58] JD25-26

[59] JD28.

[60] JD28 at fn. 23.

[61] *Purple Communications, Inc.*, 361 NLRB No. 43 (September 24, 2014) (*Purple I*). *Purple I* is remembered for the Board taking occasion to partially overrule *Register Guard*, 351 NLRB 1110 (2007). That case arose in the context of an election that took place at Respondent's unionized facilities at issue in the instant matter, but also at its facilities in Corona and Long Beach, California. In *Purple I*, the ALJ found that Respondent committed objectionable conduct during the election at its Long Beach facility sufficient to set aside the election after Respondent's President and CEO, told interpreters that he could not make changes to address their discontents given that a union election was scheduled, but that he could make such changes at those facilities where a union vote was not scheduled. This statement was made less than 2 weeks before the election and was broadly disseminated at a meeting held for all the interpreters present at the facility. *Id*. at 1121.

Union an protected activities, interfered with employees *Weingarten* rights, stopped giving full-time VIs their preferred schedules (giving them the opposite of their requested schedules in some instances), and encouraged employees to seek information on decertification.

VI. CONCLUSION

WHEREFORE, the General Counsel respectfully requests the Board grant the above exceptions for the reasons set forth in the accompanying General Counsel's Brief in Support of Exceptions to ALJ's Decision.

Dated at Phoenix, Arizona, this 14th day of December, 2018.

Respectfully submitted,

/s/ Kyler Scheid

Fernando Anzaldua
Kyler Scheid
Counsel for the General Counsel
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: 602-416-4757
Facsimile: 602-640-2178
Email: fernando.anzaldua@nlrb.gov
kyler.scheid@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE'S DECISION in *PURPLE COMMUNICATIONS, INC. and Its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS* in cases 21-CA-149635, 28-CA-179794, 21-CA-182016, 32-CA-185337, 21-CA-185343, 27-CA-185377, 27-CA-186448, 28-CA-186509, 21-CA-187642, 28-CA-192041, 27-CA-192084, 28-CA-197009, and 27-CA-197062 was served via E-Gov, E-Filing, and Electronic Mail, on this 14th day of December 2018, on the following:

Via E-Gov, E-Filing:
Roxanne Rothschild, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Via Electronic Mail:
Lawrence D. Levien
James C. Crowley
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave.,
NW Washington, DC 20036-1564
llevien@akingump.com
jcrowley@akingump.com

Sheila K. Sexton
Beeson, Tayer & Bodine
Ross House, 2nd Floor
484 Ninth Street
Oakland, CA 94607
ssexton@beesontayer.com

David Rosenfeld
Weinberg, Roger & Rosenfeld
Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net

/s/ Kyler A. Scheid

Kyler A. Scheid

Counsel for the General Counsel